No. 97-788
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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

PRESCOTT CONVENTION CENTER, INC.,

Petitioner,

v.

HAROLD SCOTT, TONY WEST, AND YAVAPAI-PRESCOTT INDIAN TRIBE,

Respondents.

YAVAPAI-PRESCOTT INDIAN TRIBE,

Petitioner,

v.

HAROLD SCOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE; TONY WEST, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF ARIZONA; AND PRESCOTT CONVENTION CENTER, INC., AN ARIZONA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does federal law preempt a State from imposing a tax on a non-Indian business operating a hotel and restaurant serving non-Indian customers?

2. Does a State's tax imposed on a non-Indian business operating a hotel and restaurant serving non-Indian customers impermissibly interfere with tribal sovereignty?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUPPLEMENTAL STATEMENT OF THE CASE 1

ARGUMENT 4

I. THE TRIBE'S ARGUMENT THAT THE STATE TAXES ARE DISCRIMINATORY WAS NOT RAISED IN THE LOWER COURTS 4

II. A STATE TAX IS NOT PREEMPTED SIMPLY BECAUSE A TRIBE INCURS COSTS TO PROVIDE SERVICES TO NON-INDIAN BUSINESSES 5

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT 9

IV. EXECUTIVE BRANCH SUPPORT FOR RESERVATION ECONOMIC DEVELOPMENT DOES NOT PREEMPT A STATE TAX ON NON-INDIANS DOING BUSINESS WITH OTHER NON-INDIANS 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Brendale v. Confederated Yakima Nation, 492 U.S. 408 (1989) 3

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 11

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) ..... *passim*

Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988)..... 7

Department of Taxation v. Milhelm Attea, 114 S.Ct. 2028 (1994) 8, 10

Gila River Indian Community v. Waddell, 967 F.2d 1404 (9th Cir. 1992)..... 7

Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990)..... 7

Montana v. United States, 450 U.S. 544 (1981) 10

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 10

Oklahoma Tax Com'n v. Chickasaw Nation, 115 S.Ct. 2214 (1995)..... 8

Ramah Navajo School Board v. New Mexico, 458 U.S. 832 (1982)..... 8

Rice v. Rehner, 463 U.S. 713 (1983)..... 7

South Dakota v. Bourland, 508 U.S. 679 (1993) 10

Strate v. A-1 Contractors, 117 S.Ct. 1404 (1997).....8, 10

United States v. McBratney, 104 U.S. 621 (1881)..... 2

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 8, 9, 11, 13

Williams v. Lee, 358 U.S. 217 (1959)..... 13

Yee v. City of Escondido, 503 U.S. 530 (1992) 5

SUPPLEMENTAL STATEMENT OF THE CASE

The Yavapai-Prescott Indian Reservation ("Reservation") is located next to, and almost completely surrounded by, the City of Prescott, Arizona. Pet. App. 3 (the Appendices to the Petitions have identical page numbering). Prescott Convention Center, Inc. ("PCC"), an Arizona corporation, built and operates a hotel and restaurant ("Hotel") on the Reservation pursuant to a 1983 long-term lease with the Yavapai-Prescott Indian Tribe ("Tribe"). *Id.*

Under the terms of the lease PCC pays the Tribe a base rent and a percentage of the Hotel's gross receipts. Pet. App. 3. In consideration for a loan of the proceeds of a federal grant received by the Tribe, PCC also pays the Tribe twenty percent of the net cash flow of the Hotel. Pet. App. 3-4. To date, no payments of net cash flow have been made. CR 40 (district court record), Ex. QQ. Both the percentage of gross receipts and net cash flow payments are calculated after deducting any taxes passed on to customers. Pet. App. 38-39. PCC has collected the state tax from its customers from the beginning of its operation by adding the tax due to the bills of customers. Pet. App. 33, 40.

The Hotel has 161 rooms, includes a restaurant, and has the capacity to serve as many as 1,200 meals. Pet. App. 4-5. Most of the Hotel's business comes from the Phoenix metropolitan area, approximately ninety miles from the Reservation. CR 40, Ex. RR. Visitors are attracted by off-Reservation advertising and through the efforts of a sales office in Phoenix. *Id.*

The Tribe does not exercise control over the operations or management of the Hotel. *Id.* PCC does not need to obtain Tribal approval before renting a room or scheduling a conference, and PCC is completely responsible for the maintenance and upkeep of the Hotel. *Id.*; Pet. App. 4. Although the Hotel employs between 150 and 200 people, none of the employees are Tribal members, and there is no evidence that any Hotel employees reside on the Reservation. Pet. App. 12.

Petitioners misstate the record when they say the State does not provide services to the Hotel. Law enforcement services are provided by the Yavapai County Sheriff's office. Pet. App. 36. The Sheriff has always had jurisdiction over and responsibility for law enforcement concerning crimes committed on the Reservation between non-Indians. *United States v. McBratney*, 104 U.S. 621 (1881). Prior to 1993, the Sheriff responded to calls from the Hotel and arrested non-Indians for crimes committed there. Pet. App. 36. In 1993, the Tribe entered an agreement to pay the Sheriff to exercise jurisdiction over Indians, and since then the Sheriff has exercised both State and tribal powers. Pet. App. 36-37. The payments made by the Tribe are not compensation for the jurisdiction exercised over non-Indians, because the Tribe has no authority to grant such jurisdiction.

PCC receives fire and emergency medical services from the Central Yavapai Fire District. Pet. App. 37. Although the District normally would not have jurisdiction on a reservation, it has agreed to provide services in exchange for a fee which substitutes for the property tax it charges off-Reservation property owners. *Id.* This cost is passed directly on to PCC by the Tribe. *Id.*

The State provides traffic control on the Reservation. *Id.* Also, the main roads through the Reservation are State highways, including the public roads leading to the Hotel. *Id.* The State maintains and patrols these roads. The State has also installed traffic lights on the Reservation, including one at the entrance to the Hotel that controls all traffic going to the Hotel, with the cost being split between the State and the Bureau of Indian Affairs. *Id.* The State maintains these traffic lights at its own expense. *Id.*

The State and Tribe share regulatory jurisdiction over the activities at the Hotel. The State and Tribe concurrently regulate liquor sales on the Reservation and the casino operated by the Tribe on the Hotel property. CR 40, Ex. M; Pet. App. 38. While the State has not exercised regulatory authority at the Hotel over certain matters such as health and food inspection (which the Tribe has actively regulated), the State has never conceded that it lacks authority to regulate non-Indians who pose a threat to the health and safety of other non-Indians, even if the activity takes place on an Indian reservation. *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989). The State also provides a forum for the resolution of civil and criminal litigation between non-Indians arising on the Reservation, and PCC has been a party in State court for its activities at the hotel. CR 40, Ex. W.

It is undisputed that the State provides significant services to Tribal members. Reservation residents attend State public schools outside the Reservation, specifically in the Prescott Unified School District and at Yavapai College. Pet. App. 38. The State provides significant financial support to these schools. Some members of the

Tribe who reside on the Reservation receive benefits administered by the Arizona Department of Economic Security. CR 40, Ex. PP. In addition, the Yavapai County Health Department provides free health services to members of the Tribe both on and off the Reservation. Pet. App. 38.

ARGUMENT

I. THE TRIBE'S ARGUMENT THAT THE STATE TAXES ARE DISCRIMINATORY WAS NOT RAISED IN THE LOWER COURTS.

The Tribe's primary argument is that the Arizona tax is discriminatory. Tribe's Petition 8-11. This argument was never raised below. While the Tribe argued that the tax was preempted by federal law and infringed on tribal sovereignty because the Tribe was forced to provide services that were provided at State expense off-reservation, the Tribe never argued in its complaint, in its pleadings to the district court, or in its brief to the court of appeals that this made the taxes discriminatory. Neither the court of appeals nor the district court addressed the issue of discrimination. Indeed, the only case cited by the Tribe in its Petition as support for its discrimination argument, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), was not even cited by either the Tribe or PCC in their briefs to the court of appeals.

Discrimination is not fairly included within the issue of preemption. Preemption analysis depends on whether Congress has granted a tribe immunity from taxation

"either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6. Discrimination depends on unequal enforcement of a tax. If the issue of discrimination had been raised below then the State could have shown that most of the services that the Tribe alleges are not provided to the Reservation are in fact provided by local governments in Arizona and that these governments are funded primarily by the property tax, a tax which is not imposed on the Hotel or any other Tribal property.

Moreover, there is no dispute that the State taxes are applied to hotels and restaurants outside the Reservation, and the customers who pay the tax as a part of their bills are non-Indians who reside outside the Reservation and benefit from all State services. The State applies the taxes to all similarly situated businesses, so there is no discrimination.

The Tribe cannot raise the issue of discrimination for the first time in its Petition. *Yee v. City of Escondido*, 503 U.S. 530, 533 (1992). To the extent the Petition challenges the taxes as being discriminatory, the Petition should be denied.

II. A STATE TAX IS NOT PREEMPTED SIMPLY BECAUSE A TRIBE INCURS COSTS TO PROVIDE SERVICES TO NON-INDIAN BUSINESSES.

The Tribe complains that "the State forces the Tribe to furnish to the Hotel the same government services that the Taxes fund for off-Reservation taxpayers." Tribe's Petition at 9. The State has no such power. As shown above, the State provides services to the Reservation to the extent of its authority. Tribal sovereignty limits the

State's criminal and civil authority over Tribal members and property, including the Hotel itself because the Tribe holds legal title to the building. Nevertheless, the State has worked cooperatively with the Tribe to exercise their concurrent jurisdiction. *Cf. Cotton Petroleum,* 490 U.S. at 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over Cotton's leases.").

The shared sovereignty of the Tribe and State over non-Indian activities on the Reservation gives the Tribe responsibilities that may cost it money. The Tribe may choose to fulfill its responsibilities directly or by paying other local governments to perform certain functions, but that choice does not reduce the State's power to tax non-Indians on the Reservation. The Tribe is not paying State political subdivisions for services to which it is otherwise entitled. It is paying those agencies to exercise Tribal authority and provide services for which the Tribe, as a local government, is responsible.[1]

The Tribe's complaint that the court of appeals abandoned its test that State taxes must be "narrowly tailored" to providing services on the Reservation is both wrong and a misstatement of precedent. Tribe's Petition at 10. The Ninth Circuit has never held that a State tax imposed on non-Indians must be "narrowly tailored" to State services to the reservation. The cases which have required a "narrow tailoring" have all involved taxes imposed on or passed onto a tribe or tribal resources.

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[1] In fact, the Tribe and PCC agreed in the lease that the Tribe would have no responsibility to provide or pay for police protection, fire protection, or street maintenance. Pet. App. 4.

Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988). In other words, the narrowly tailored requirement is only triggered when the tax is effectively a tax on the tribe itself, and has actually been discussed by the court of appeals as a means for a State to justify a tax on a tribe in the face of strong federal and tribal interests. *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992) ("We have previously held that a State may avoid the preemption of its taxing authority in a case where strong federal and tribal interests exist only if its taxes are 'narrowly tailored' to funding the services it provides in connection with the activities taking place on tribal land."). Given the strong federal policy of tribal immunity from state taxation, it makes sense that a tax on a tribe will be upheld only if connected to services provided to the tribe or tribal members.

Such a requirement makes no sense when the tax is imposed on commercial transactions between non-Indians. There is no federal policy or tradition favoring tax immunity of non-Indians, particularly when conducting business between themselves. If there is no tradition of tribal sovereignty, or tribal immunity from State law, this Court has recognized that tribal interests do not act to bar State jurisdiction. *Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis

may accord less weight to the 'backdrop' of tribal sovereignty."); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' ").

This Court has repeatedly upheld State taxes on non-Indians without requiring a direct connection between the tax and State services to the reservation. *Oklahoma Tax Com'n v. Chickasaw Nation*, 115 S.Ct. 2214 (1995) (income tax); *Department of Taxation v. Milhelm Attea*, 114 S.Ct. 2028 (1994) (tobacco taxes); *Cotton Petroleum, supra* (mineral taxes); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (tobacco taxes). Whether a State provides services or has abandoned an on-reservation activity may be one factor in determining the strength of federal and tribal interests, *see Ramah Navajo School Board v. New Mexico*, 458 U.S. 832 (1982) (state closed public high school), but when those interests are weak because the taxed transactions involve only non-Indians the existence or scope of state services is of little weight. The court of appeals recognized this. Pet. App. 11 ("[T]he requirement of narrow tailoring is elusive and its appropriateness remains dependent on the strength of the tribal and federal interest found to exist.").

In *Cotton Petroleum* this Court rejected the argument that there must be a strict *quid pro quo* between the taxpayer and the tax collector, stating that taxes need not be proportionate to the services provided. *Cotton Petroleum*, 490 U.S at 184. The Tribe's argument merely rephrases the argument rejected in *Cotton Petroleum*, and

makes no sense when applied to taxes imposed on non-Indian transactions.

The court of appeals correctly rejected the Tribe's argument that a connection between a tax and State services is a precondition to any imposition of State tax.[2]

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

Both the Tribe and PCC argue that the court of appeals erred in its analysis by giving considerable weight to the fact that the Hotel is operated by a non-Indian lessee. Tribe's Petition at 11-17; PCC's Petition at 10-12. They ignore the fact that whether a person is a tribal member is the first, and often controlling, question in any inquiry concerning jurisdiction on Indian reservations.

This Court has repeatedly noted the importance of the fact that transactions involve non-tribal members. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), State taxes on non-Indians

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[2] PCC's assertion that the court of appeals' decision is inconsistent with a Tenth Circuit holding is wrong. PCC's Petition at 11-12, *citing Indian Country U.S.A. v. Oklahoma State Tax Comm.*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S 1218 (1988). In that case the Tenth Circuit specifically found the bingo operation to be a tribal enterprise, and consequently determined that the State improperly attempted to regulate a transaction between a tribe and non-Indians. The presence of non-Indian capital was a factor to be considered, as it was in this case, but it was not controlling.

were held to be valid, primarily because the taxes were imposed on non-Indians and not a tribe. Indeed, *Cotton Petroleum* noted that "[i]t is important to keep in mind that the primary burden of the state tax falls on the non-Indian taxpayers." 490 U.S. at 187, n.18. *See also Department of Taxation v. Milhelm Attea,* 114 S.Ct. 2028 (1994) (Indian trader statutes did not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers).

Increased State interest in transactions between non-Indians is consistent with this Court's holding that any Indian preemption analysis involves a balancing of federal, tribal, and state interests, and "the traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 (1983). Tribal sovereignty over non-members is limited. *Strate v. A-1 Contractors,* 117 S.Ct. 1404 (1997) (no tribal court jurisdiction over tort between non-members on state highway); *Montana v. United States,* 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *see also South Dakota v. Bourland,* 508 U.S. 679, 695, n.15 (1993) (*quoting Montana,* 450 U.S. at 564) ("[A]fter *Montana,* tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' "). State law applied to non-Indians engaged in commercial transactions with other non-Indians does not infringe on tribal sovereignty because the law is not imposed directly on the tribe or a transaction with the tribe, only the non-Indians.

Petitioners' reliance on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), is misplaced. Tribe's Petition at 14-15; PCC's Petition at 7. In *Cabazon*, the games were owned by the tribes themselves, and "the state and county laws at issue [were] imposed directly on the Tribes that operate the games." *Id.* at 214. The tribes in *Cabazon*, unlike the Tribe here, did not merely give a long-term interest in real property to non-Indians and leave them to organize, operate and manage a non-tribal business.

Although Petitioners cite with approval the dissent in the court of appeals, the dissent actually conflicts with this Court's decisions because it gave controlling weight to the general federal policy of encouraging reservation economic development. Pet. App. 21-26. This Court's decisions plainly hold that such general interests are not sufficient to show preemption. *Cotton Petroleum*, 490 U.S. at 183, n. 14; *Colville*, 447 U.S. at 155. The dissent also found a comprehensive federal regulatory scheme in statutes which do not regulate the transactions being taxed, the sales by PCC to its non-Indian customers. Pet. App. 23. This Court has never held a State tax on non-Indians to be preempted in the absence of federal statutes that directly regulate the taxed activity, yet Petitioners seek that result.

The court of appeals correctly applied this Court's precedents in holding that non-Indian transactions taking place at the Hotel are taxable.

IV. EXECUTIVE BRANCH SUPPORT FOR RESERVATION ECONOMIC DEVELOPMENT DOES NOT PREEMPT A STATE TAX ON NON-INDIANS DOING BUSINESS WITH OTHER NON-INDIANS.

PCC argues that the court of appeals' decision is contrary to executive branch policies favoring economic development on Indian reservations. PCC's Petition at 6-9. This argument is without merit for several reasons.

First, while a state tax may be preempted by federal law, it is Congress which makes law, not the executive branch. As this Court stated in *Cotton Petroleum*, the "question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication." 490 U.S. at 175-6. "[D]etermining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent." *Id.* at 176. Executive statements and acts may be used to provide insight into congressional intent, but they cannot constitute federal law sufficient to preempt a state tax. Moreover, as discussed above, no act of Congress has shown any intent, express or implied, to preempt a state tax on commercial transactions between non-Indians.

Second, PCC fails to recognize that economic development may take place without barring a State from imposing its taxes or to cite a single law or executive statement relating to taxation. PCC considers any tax burden as being contrary to federal policy. This argument is meritless. *Cotton Petroleum*, 490 U.S. at 180 ("We thus agree that a purpose of the 1938 Act is to provide Indian

tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization.") and 490 U.S. at 179 ("It is however quite remarkable, indeed unfathomable in our view, to suggest that Congress intended to remove all state-imposed obstacles to profitability by attaching to the Senate and House Reports a letter from the Secretary that happened to include the phrase 'the greatest return from their property.' "); *Colville*, 447 U.S. at 156 ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' *Williams v. Lee*, 358 U.S. 217, 220 (1959) merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving.").

Because the tax is passed on to the non-Indian customers, the only true harm which can be asserted by the Tribe is that it cannot increase its own tax. The Tribe voluntarily agreed to limit its own taxes as long as the State tax is imposed. This Court has repeatedly held that a State tax may be imposed on non-Indians on a reservation even when a tribe is taxing the same activity, so there is no preemption or interference with tribal sovereignty because of concurrent taxing jurisdiction. *Cotton Petroleum*, 490 U.S. at 187-190; *Colville*, 447 U.S. at 157-59.

PCC's argument that economic development must be tax-free development is not supported by any federal statute or caselaw. The court of appeals correctly held that the federal interest in promoting reservation economic development is insufficient to preempt a State tax on transactions between non-Indians taking place on the reservation.

CONCLUSION

The court of appeals summarized its reasoning by stating:

> All the sales are by non-Indians to non-Indians. There is no tribal employment. There is no active tribal participation in the business. The State provides substantial governmental services to the business taxed.

Pet. App. 15. Based on these facts the court of appeals properly held that federal preemption does not prevent a State from taxing hotel and restaurant services sold to non-members of an Indian tribe by a non-Indian owned company doing business on an Indian reservation.

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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